Public Prosecutor v Ho Huah Teong

COURT OF APPEAL (KUALA LUMPUR) — CRIMINAL APPEAL NO P09–3 OF 1997
LAMIN PCA, ABDUL HAMID MOHAMAD AND ABDUL KADIR SULAIMAN JJCA
3 AUGUST 2001

Criminal Procedure *— Transfer of cases — Power of sessions court — Proceedings instituted in sessions court — Whether sessions court had power to transfer case to magistrates' court for trial without consent of Public Prosecutor*

In this case the issue which arose for decision was whether, in the case of an offence for which a person was charged fell within the jurisdiction of both the magistrates' court and the sessions court and the Public Prosecutor had instituted proceeding in the sessions court, the sessions court, without the consent of the Public Prosecutor, had the power to transfer the case to the magistrates' court.

Held, allowing the appeal:

Where the Public Prosecutor had in the exercise of his discretion charged a person for a criminal offence in the sessions court, the sessions court, without the consent of the Public Prosecutor, had no power to transfer the case for trial in the magistrates' court, even though the magistrates' court had jurisdiction over the offence (see p 25C–D); *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65, *PP v Tengku Hitam* [1962] MLJ 414 and *Abdul Wahab v PP* [1970] 2 MLJ 203 followed.

[**Bahasa Malaysia summary**

Dalam kes ini isu yang timbul untuk keputusan adalah sama ada, dalam kes satu kesalahan yang untuknya seseorang itu dituduh termasuk di dalam lingkungan bidang kuasa kedua-dua mahkamah majistret dan mahkamah sesyen dan Pendakwa Raya telah memulakan tindakan di dalam mahkamah sesyen, mahkamah sesyen, tanpa persetujuan Pendakwa Raya, mempunyai kuasa untuk memindahkan kes itu ke mahkamah majistret.

Diputuskan, membenarkan rayuan:

Di mana Pendakwa Raya telah dalam menjalankan budibicaranya mengemukakan tuduhan terhadap seseorang untuk satu kesalahan jenayah dalam mahkamah sesyen, mahkamah sesyen, tanpa persetujuan Pendakwa Raya, tidak mempunyai kuasa untuk memindahkan kes itu untuk perbicaraan di mahkamah majistret, biarpun mahkamah majistret mempunyai bidang kuasa ke atas kesalahan itu (lihat ms 25C–D); *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65, *PP v Tengku Hitam* [1962] MLJ 414 dan *Abdul Wahab v PP* [1970] 2 MLJ 203 diikut.]

Notes

For a case on the power of the sessions court to transfer cases, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) para 3203.

Cases referred to

Abdul Wahab v PP [1970] 2 MLJ 203 (folld)
Johnson Tan Han Seng v PP [1977] 2 MLJ 66 (refd)
Long bin Samat v PP [1974] 2 MLJ 152 (refd)
PP v Lim Shui Wang & Ors [1979] 1 MLJ 65 (folld)
PP v Tengku Hitam [1962] MLJ 414 (folld)

Legislation referred to

Criminal Procedure Code s 376(1)
Federal Constitution art 145(3)
Subordinate Courts Act 1948 s 104

Vong Poh Fah (Senior Deputy Public Prosecutor) for the appellant.
T Theebajothi (*Kumar & Co*) for the respondent.

Abdul Hamid Mohamad JCA (delivering judgment of the court): **.**

The respondent was charged in the sessions court on two counts, both under s 408 of the Penal Code involving two sums of money, ie RM227,048.50 and RM309,364.50. The trial was scheduled to take place from 20–22 January 1997. But, on 30 December 1996 the sessions court judge, on his own motion, ordered that the case be transferred to the magistrates' court for trial.

The deputy public prosecutor ('the DPP'), being unhappy with the said order requested the High Court to exercise its power of revision over the said order of the sessions court. The High Court held that the sessions court had power to order the transfer and declined to exercise its revisionary power pursuant to Cap XXXI of the Criminal Procedure Code. The Public Prosecutor appealed to this court.

The appeal came up for hearing on 15 January 2001 before Lamin Mohd Yunus, the then President of the Court of Appeal, Abdul Kadir Sulaiman JCA and myself. Considering that the point of law that the court was asked to decide for the first time is of considerable importance, we ordered both parties to put in written submissions and adjourned the appeal to another date to be fixed for decision. The DPP gave us his written submission on 22 February 2001. But, the learned counsel for the respondent, by a letter dated 30 March 2001 informed the court that he agreed with the submission of the learned DPP that the learned High Court judge had wrongly refused to exercise her revisionary power.

In the meantime, the President of the Court of Appeal has retired, leaving my brother Abdul Kadir Sulaiman JCA and myself to give our judgment.

We were told by the learned DPP that the trial in the magistrates' court had commenced as the Public Prosecutor did not want any further delay in the disposal of the case. In other words, the Public Prosecutor, for reasons of expediency, has consented to the trial to proceed in the magistrates' court. However, as this is a question of law of great importance to the Public Prosecutor and as such transfers of cases are often made by sessions court judges, on their own motion, the DPP and the learned counsel for the respondent urged this court to make a ruling. It must therefore be understood that this ruling will not affect the trial in the magistrates' court, which has now received the consent of the Public Prosecutor.

The question can be thus put: Where an offence for which a person is charged falls within the jurisdiction of both the magistrates' court and the sessions court and the Public Prosecutor has instituted proceeding in the sessions court, has the sessions court, without the consent of the Public Prosecutor, the power to transfer the case to the magistrates' court?

The learned High Court judge held that the sessions court had such power, relying on s 104 of the Subordinate Courts Act 1948 ('the Act'), which provides:

> A sessions court judge or a magistrate shall have jurisdiction in any criminal cause or matter, whether or not he has jurisdiction finally to hear and determine the same, to order, in any case where the interests of justice so require, that the cause or matter be transferred to any other sessions court or magistrates' court, as the case may be, which in his opinion has jurisdiction to hear and determine the same, and the same may be continued in that other court accordingly:
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> > 'Provided that nothing in this section shall be deemed to confer jurisdiction on any court to which a proceeding is so transferred, if that court would not otherwise have jurisdiction in respect thereof.'

She further held that the Federal Court judgment in *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65 was distinguishable.

Before us, the learned DPP, argued that that provision of s 104 of the Act was overridden by the provisions of art 145(3) of the Federal Constitution ('the Constitution') and also s 376(1) of the Criminal Procedure Code ('the CPC').

Article 145(3) of the Constitution provides:

> The Attorney General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah court, a native court or a court-martial.

Section 376(1) of the CPC provides:

> The Attorney General shall be the Public Prosecutor and shall have the control and direction of all criminal prosecutions and proceedings under this Code.

There is no doubt that under art 145(3) of the Constitution, the Public Prosecutor may choose to charge a person for a more or less serious offence provided by law. *Long bin Samat v PP* [1974] 2 MLJ 152 (FC) and *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66 (FC) are directly on point.

There is also no doubt that the Public Prosecutor may choose to charge and prosecute a person either in the High Court, the sessions court or the magistrates' court, provided the court has jurisdiction over the offence. This is made clear by Suffian LP in *PP v Lim Shui Wang* [1979] 1 MLJ 65 (FC) at p 67:

> We next turn to s 376(1) of the Criminal Procedure Code and art 145(3) of the Constitution.
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> In our view the words 'institute, conduct' in art 145(3) are wide enough to confer on the Attorney General unfettered discretion to choose in which court, a higher or lower court, to bring persons charged under s 39B(1)(a) of the Dangerous Drugs Ordinance, though of course he does not have nor is it contended that he has, power to choose which particular judge or president should actually try the case. The word 'institute' means to set on foot, initiate, start, so that the Attorney General has power, at his discretion, to initiate a case such as the present ones, before a Special President or a High Court judge. We respectfully agree with Abdoolcader J when he said at p 119 in *PP v Datuk Harun bin Haji Idris* [1976] 2 MLJ 116:
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> > ' "Institute" in art 145(3) … must necessarily refer to the commencement of proceedings and prosecutions … It may well be … that the Public Prosecutor has power … to direct any case triable in the magistrate's or sessions court to be tried in the High Court after a preliminary enquiry. This power to so direct would, if exercised, fall squarely within his discretion to institute and conduct criminal prosecutions and proceedings.'
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> In view of the large quantity of heroin involved and the serious drug problem that afflicts the young in this country, it is obvious that the Attorney General thinks that life imprisonment for these respondents will not be sufficient deterrent for other would-be traffickers. The Attorney General has information and sources of information not available to the courts, and possessed of this information he may regard it as his public duty to have these persons tried in a court which has power to pass sentence of death, though that still leaves the trial court free to impose a lesser penalty if it thinks fit, and if he does so, the High Court has no alternative but to try the case.

Indeed, there are occasions when the Public Prosecutor having charged a person in the magistrates' court, the High Court, on appeal commented that in view of the criminal record and history of the accused, the Public Prosecutor should have charged him in the sessions court, so that a heavier sentence may be imposed, if convicted. *PP v Tengku Hitam* [1962] MLJ 414 (Hashim J) and *Abdul Wahab v PP* [1970] 2 MLJ 203 (Sharma J) are good examples.

But these are not the issues in the present case. The issue here is whether the Public Prosecutor having charged the respondent in the sessions court, the sessions court may transfer the case to the magistrates' court for trial.

Reading s 104 of the Act 1948 by itself, there is no doubt that it is within the power of the sessions court judge to do so. But, can the sessions court do so in view of the provisions of art 145(3) of the Constitution and s 376(1) of the CPC?

A We are of the view that the answer is in the negative. Our reasons are as follows: If we accept, as indeed we do, that the Public Prosecutor may choose in which court having jurisdiction over the offence a person may be charged and tried, then, to allow that court to transfer it to another court, is to negate that discretion and decision of the Public Prosecutor. Indeed, that would amount to an interference by the court with the exercise of
B discretion by the Public Prosecutor in the discharge of his public duty enshrined in the Constitution. Administratively, it may also lead to the sessions court passing the bulk to the magistrates' court causing delay in the trial and disposal of the case as has happened in this case. We are also of the view that this conclusion is supported by the principles laid down in *PP v Lim Shui Wang & Ors* [1979] 1 MLJ 65 (FC) and the observations made
C by the learned judges in *PP v Tengku Hitam* and *Abdul Wahab v PP*.

We hold therefore that where the Public Prosecutor has in the exercise of his discretion, charged a person for a criminal offence in the sessions court, the sessions court, without the consent of the Public Prosecutor, has no power to transfer the case for trial in the magistrates' court, even though
D the magistrates' court has jurisdiction over the offence.

The appeal is allowed.

Appeal allowed.

Reported by Kevin Ooi

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